No. ~~1013~~ 67

# In the Supreme Court of the United States

OCTOBER TERM, 1940

SOUTHPORT PETROLEUM COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 112–117)[1] is reported in 117 F. (2d) 90. The findings of fact, conclusion of law, and order of the National Labor

[1] Pursuant to a stipulation of the parties (R. 129–130), the printed record for purposes of the petition for certiorari consists of: (1) a printed volume entitled "Transcript of Record," which is referred to herein by the symbol (R.) and which contains the complaint, the decision of the Board, and various other proceedings; (2) the appendix to petitioner's brief filed in the court below, which is not referred to herein; and (3) the appendix to the Board's brief filed in the court below, which is referred to herein by the symbol (B. A.).

Relations Board (R. 61–84) are reported in 8 N. L. R. B. 792.

## JURISDICTION

The decree of the court below (R. 127–128) was entered on February 26, 1941. The petition for a writ of certiorari was filed on May 1, 1941, and served on May 15, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Pet. 4).

## QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged three of its employees in violation of Section 8 (3) and (1) of the National Labor Relations Act.

2. Whether an order of the Board appropriate to remedy unfair labor practices and directed to petitioner, its officers, agents, successors, and assigns, became invalid or moot by reason of an alleged dissolution of petitioner occurring after the order's issuance, and whether the court below was, upon motion by petitioner, required to withhold enforcement of the Board's order and to remand the proceeding to the Board for the production of evidence concerning the alleged dissolution.

3. Whether the court was required to deny enforcement to the Board's order by reason of the fact that a period of 20 months elapsed between the issuance of the order and the filing of a petition for enforcement by the Board.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Section 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 11–12.

## STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 61–84). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

During the spring of 1937 petitioner, through the manager of its refinery at Texas City, Texas, pointedly expressed its hostility and opposition to the Oil Workers International Union, Local No. 227, which was then attempting to organize the refinery employees (R. 71; B. A. 16, 19–20, 23–24, 32, 34, 41, 47–48, 61). On August 4, 1937, petitioner discharged the vice president and secretary of the Local, William Cornish and Earl Gooch; these men were competent employees of 2 and 4½ years' service, respectively, and were among the most active members of the union (R. 74, 75, 76; B. A. 22, 29, 30, 31, 32, 33, 36, 42, 61–62, 70–71). Petitioner's explanations of the discharges did not reflect the true reasons therefor (R. 74–75, 76–78; B. A. 37,

[2] In the following statement the references preceding the semicolon are to the Board's findings, and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted since no question as to jurisdiction is raised.

40, 63–65, 74, 77–78, 85–86, 99–101). Petitioner also discharged E. D. Richey, a competent employee of 2 years' service and an outstandingly active member of the union (R. 72; B. A. 52, 53). The Board found that Richey's union activities constituted the sole ground for his discharge (R. 72–73; B. A. 57, 58, 59, 69, 72, 82–84, 92, 93, 112).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (3) and (1) of the Act (R. 73–75, 78).[3] Upon the foregoing findings the Board issued its usual order requiring petitioner, its officers, agents, successors, and assigns, to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the discriminatorily discharged empoyees, and to post notices (R. 82–83).

On April 30, 1940, the Board filed in the court below a petition for enforcement of its order (R. 1–7). Thereafter petitioner filed with the court an application for leave to adduce additional evidence that on June 30, 1939, it had declared a liquidating dividend of all its assets among its four stockholders and that the Texas City refinery had been distributed to two of the stockholders who thereafter conveyed the property to a new corporation whose stockholders had never owned any of petitioner's

[3] The Board dismissed the complaint insofar as it alleged that petitioner had refused to bargain collectively in violation of Section 8 (5) and had discharged Edward A. Patricio in violation of Section 8 (3) (R. 66–70, 78–79, 82, 83).

stock (R. 96–98). The Board filed its opposition to this application (R. 99–104). Thereafter petitioner filed an answer to the enforcement petition (R. 105–111).

On January 4, 1941, the court below handed down its opinion (R. 112–117) denying the motion to adduce additional evidence and enforcing the Board's order in full. A petition for rehearing filed by petitioner (R. 119–126) was denied on February 1, 1941 (R. 127). A decree was entered pursuant to the court's opinion on February 26, 1941 (R. 127–128).

## ARGUMENT

1. Petitioner's contention (Pet. 12–13) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence referred to in the Statement (*supra*, pp. 3–5) affords abundant support for the challenged findings.

2. Petitioner contends (Pet. 6–8) that the court should not have enforced the Board's order, but should have granted petitioner's motion to remand the case to the Board to adduce evidence concerning the asserted dissolution of petitioner (*supra*, p. 4). But such evidence was plainly not "material" within the meaning of Section 10 (e) of the Act (*infra*, pp. 11–12). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305

U. S. 197, 230.[4] It was not relevant in any way to the sole question before the court—whether the Board's order was "lawful when made" (*Pennsylvania Greyhound* case, *loc. cit. supra*)—but was relevant only to the question concerning the extent of action required to comply with the Board's order if the order was enforced by the court.[5] The resolution of questions of this kind in proceedings for enforcement or review of a Board order

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[4] See also *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5); *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541 (C. C. A. 9), certiorari denied, 306 U. S. 646.

[5] Plainly, insofar as the Board's order was directed to petitioner's "officers, agents, successors, and assigns" (R. 82), its validity was entirely unaffected by petitioner's alleged dissolution. *National Labor Relations Board* v. *W. C. Bachelder, receiver for Hoosier Veneer Co.*, decided March 13, 1941 (C. C. A. 7); *Bethlehem Steel Co.* v. *National Labor Relations Board*, decided May 12, 1941 (C. A. D. C.); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6). And even so far as petitioner itself is concerned, it may not be contended that the dissolution prevented petitioner from taking any action whatsoever to comply with the court's decree. Petitioner continues to exist for certain purposes (Vernon's Annotated Civil Statutes of Texas [1939], Art. 1388); included within these purposes would be at least the payment of back pay in compliance with the decree. Further, petitioner may be required to obtain performance by its agents of any provisions which it is incapable of performing itself. *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97, 102, on contempt, 104 F. (2d) 302, 304 (C. C. A. 2).

might involve repeated remands to the Board for the purpose of adducing additional evidence. If the Act is to be workable, questions relating to the extent of compliance should be left to adjustment by agreement of the parties or in supplemental proceedings, after the validity of the order has been determined and its enforcement decreed.[6]

Petitioner's assertion (Pet. 6–7, 10) that the court's denial of the motion for leave to adduce additional evidence is in conflict with the decision of this Court in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, is plainly without merit. That case involved only the propriety of the remand by the Circuit Court of Appeals to the Board to remedy alleged procedural defects and omissions which were asserted to invalidate the Board's order. There are no such defects or omissions here. Further, the question whether it would have been error for the Circuit Court of Appeals to refuse a remand was not before this Court in that case.

3. Upon the assumption that the reinstatement provisions of the Board's order are not enforceable by reason of petitioner's asserted dissolution, peti-

[6] See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 421–422 (C. C. A. 2); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9), cert. denied, 306 U. S. 646; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194, 196 (C. C. A. 9); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 197–198 (C. C. A. 9).

tioner contends (Pet. 7, 11–12) that the enforcement of the back-pay provisions is in conflict with *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646. The Board's power to direct back pay although the normal reinstatement remedy is withheld was sustained in *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term, decided April 28, 1941.[7] Further, in *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 664 (C. C. A. 9), the court held that the rule of the *Carlisle Lumber* case applied only where reinstatement could not be required at the

[7] In the *Phelps Dodge* case the Circuit Court of Appeals expressly held that the Board could require back pay in the absence of reinstatement and enforced the Board's order of back pay to one employee who had become unemployable prior to the Board's order; the court also held that the back pay order was valid as to those individuals whom it considered to be beyond the Board's reinstatement power because they obtained substantially equivalent employment. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 205–206 (C. C. A. 2). The Company's petition for certiorari expressly challenged this holding (Pet. for certiorari, No. 387, this Term, p. 15), and the point was briefed (Brief for *Phelps Dodge Corp.*, Nos. 387, 641, this Term, pp. 44–45; Brief for the National Labor Relations Board, Nos. 387, 641, this Term, pp. 43–44). This Court sustained the decision of the Circuit Court of Appeals as to the striker who became unemployable; in view of this Court's disposition of the substantially equivalent employment question, it was unnecessary to pass upon the Board's power to order back pay without reinstatement to the strikers who obtained such employment.

time of the Board's order; the court enforced a back-pay order although reinstatement had been rendered impossible by circumstances arising after issuance of the Board's order.

4. Petitioner contends (Pet. 5, 11) that the Board's failure, for a period of 20 months* after issuance of its order, to file a petition for enforcement under Section 10 (e), rendered the order "unenforceable." The short answer is that at any time during the period of delay complained of petitioner was free to file a petition to review and set aside the Board's order under Section 10 (f) of the Act. *National Labor Relations Board* v. *Nebel Knitting Co., Inc.*, 103 F. (2d) 594, 595 (C. C. A. 4). Moreover, the defense of laches is not available in a proceeding brought by an agency of the Federal Government. *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123; *Board of Commissioners* v. *United States*, 308 U. S. 343. Petitioner's claim is of a type which has been uniformly rejected under the Act. See, *e. g.*, *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term, decided April 28, 1941; *Triplex Screw Co.* v. *National Labor Relations Board*, de-

* The delay is attributable, in part, to these circumstances: On June 27, 1939, petitioner executed a settlement agreement wherein it agreed to comply with the Board's order (R. 89-92). Respondent thereafter failed to comply with this agreement and the Board, in April 1940, filed its enforcement petition (see R. 100).

cided March 14, 1941 (C. C. A. 6); *National Labor Relations Board* v. *Superior Tanning Co.* (C. C. A. 7), certiorari denied, No. 784, this Term.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1941.

# APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V, Sec. 151, *et seq.*):

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (e) * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its

member, agent, or agency, and to be made a part of the transcript. * * *

SEC. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

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